STATE OF MICHIGAN

COURT OF APPEALS

In re Application of Detroit Edison Company for Reconciliation.

ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION and DETROIT EDISON COMPANY,

Appellees.

UNPUBLISHED
September 22, 2011

No. 296373
Public Service Commission
LC No. 00-014838-R

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

The Association of Businesses Advocating Tariff Equity ("ABATE") claims an appeal from an order entered on January 11, 2010, by the Michigan Public Service Commission ("PSC") approving an application filed by Detroit Edison Company ("Detroit Edison") for reconciliation of the choice incentive mechanism ("CIM") for the period January 1, 2008, through April 13, 2008. We affirm.

I. BACKGROUND

The Electric Choice Act[1] allowed customers of Detroit Edison to purchase electricity from alternative electric suppliers and to receive that electricity over equipment owned by Detroit Edison. Detroit Edison's revenues decreased when its customers purchased electricity from other suppliers, and increased when those customers resumed purchasing electricity from Detroit Edison.

[1] MCL 460.10 *et seq*.

On March 23, 2006, the PSC issued an order[2] directing Detroit Edison to show cause why its retail electric rates should not be reduced.[3] ABATE intervened in the proceedings. On August 31, 2006, the parties entered into a settlement agreement. Detroit Edison agreed to reduce its rates by a total of $78.75 million on a temporary basis, and the parties agreed to establish a CIM. The settlement agreement provided, in pertinent part:

> 4.1 The parties agree to establish a CIM. (Attachment A, p. 2 of 4) The purpose of the CIM is to create an incentive for the Company to further reduce costs in the event Electric Choice sales change from the level of Electric Choice sales used in establishing a revenue reduction in this Settlement Agreement. The Attorney General has concerns regarding whether or not rate adjustment clauses such as this one are lawful, but agrees to this clause solely for the purpose of achieving the other customer benefits created by this settlement.
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> 4.3 In the event of a decrease in annual Electric Choice sales below a base level of sales of 3,200 GWh (3,400 GWh less a dead band adjustment of 200 GWh, which is equivalent to $8 million) the CIM is also designed to allow Edison to credit 100% of its increase in non-fuel revenues associated with Choice sales levels below 3,200 GWh, against any regulatory asset balances not yet recovered via the Regulatory Asset Recovery Surcharge (RARS) mechanism (e.g. Clean Air compliance costs as well as other Section 10d(4) costs), authorized for recovery by the Commission in its Opinion and Order in Case No. U-13808.
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> 4.7 For decreases in Choice sales volume, the additional non-fuel revenue will be first used to reduce unrecovered regulatory asset balances related to the RARS mechanism. The regulatory asset balance will be reduced by rate class and will be allocated on an equal percentage of full-service revenues. If those decreases result in credits larger than the RARS asset balances after RARS surcharges are credited, then the balance of the non-fuel revenue credits will be credited to full service customers in proportion to their share of the $78.5 million rate reduction identified by this Settlement Agreement.

In an order entered on August 31, 2006, the PSC approved the settlement agreement.

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[2] Case No. U-14838.

[3] The PSC issued the March 23, 2006, order to determine whether Detroit Edison's rates were appropriate in light of Detroit Edison's rising income and its customers' rising costs.

On March 28, 2008, Detroit Edison filed an application[4] requesting that the PSC approve its reconciliation of the CIM for the 12-month period ending on December 31, 2007. The parties entered into a settlement agreement, which the PSC approved.

II. UNDERLYING PROCEEDINGS IN THE INSTANT CASE

On March 30, 2009, Detroit Edison filed an application in Case No. U-14838-R for reconciliation of the CIM for the period January 1, 2008, through April 13, 2008 (the date of the CIM termination). Detroit Edison submitted evidence establishing that because its Electric Choice sales decreased below the base level, it was required to refund $20,067,000 to its customers. Detroit Edison sought to allocate the entire refund to the RARS balance for the residential customer rate class because the RARS balances for the commercial customer and the industrial customer rate classes had been extinguished in the previous CIM reconciliation.

ABATE intervened and opposed Detroit Edison's allocation proposal, asserting that the refund should be allocated among the customer classes based on their percentage of total Choice purchases during the relevant period. The PSC Staff agreed with Detroit Edison's proposed allocation of the CIM refund.

In the order of January 11, 2010, the PSC adopted Detroit Edison's proposed allocation of the CIM refund, reasoning:

> Section 4.7 of the settlement agreement provides that "the additional non-fuel revenue will be first used to reduce unrecovered asset balances related to the RARS mechanism." ABATE's proposed allocation method is explicitly based upon "assuming that the Settlement Agreement did not exist. Exhibit AB-5. The Commission agrees with the Staff, and adopts the recommendation of the ALJ. The meaning of the first sentence of Section 4.7 is plain. That sentence is not contradicted by the sentences that follow it, which simply describe how to allocate the refund where more than one rate class has a RARS balance remaining. In this case, it is undisputed that only the residential rate class has an existing RARS balance. As such, the $20,067,000 increase in non-fuel revenue caused by lower than expected choice sales should be applied to the remaining RARS balance as of year-end 2008 in accordance with the settlement agreement. [(footnote omitted).]

III. STANDARD OF REVIEW

This Court has previously addressed the proper standard of review for PSC orders and determined:

> The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL § 462.25 . . . all rates, fares, charges, classification and joint rates,

[4] Case No. U-14838.

> regulations, practices, and services prescribed by the PSC are presumed, prima facie, to be lawful and reasonable. A party aggrieved by an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. Also, Const 1963, art 6, § 28 applies and provides that a final agency order must be authorized by law and be supported by competent, material, and substantial evidence on the whole record. This Court gives due deference to the PSC's administrative expertise and is not to substitute its judgment for that of the PSC.[5]

To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment.[6]

The proper standard of review for application with regard to "agency statutory construction" has been reaffirmed by our Supreme Court, which has indicated:

> [T]he construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration and on the courts, and [w]hile not controlling, the practical construction given to doubtful or obscure laws in their administration by public officers and departments with a duty to perform under them is taken note of by the courts as an aiding element to be given weight in construing such laws and is sometimes deferred to when not in conflict with the indicated spirit and purpose of the legislature.
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> This standard requires "respectful consideration" and "cogent reasons" for overruling an agency's interpretation. Furthermore, when the law is "doubtful or obscure," the agency's interpretation is an aid for discerning the Legislature's intent. However, the agency's interpretation is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue.[7]

Whether the PSC exceeded the scope of its authority is a question of law that we review de novo.[8]

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[5] *Attorney General v Mich Pub Serv Comm No 2*, 237 Mich App 82, 88; 602 NW2d 225 (1999) (internal citations omitted).

[6] *In re MCI Telecom Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999).

[7] *In re Complaint of Rovas Against SBC Mich*, 482 Mich 90, 103-109; 754 NW2d 259 (2008), citing *Boyer-Campbell v Fry*, 271 Mich 282; 260 NW 165 (1935). See also *Great Wolf Lodge v Pub Serv Comm*, 489 Mich 27, 37-38; 799 NW2d 155 (2011).

[8] *In re Complaint of Pelland Against Ameritech Mich*, 254 Mich App 675, 682; 658 NW2d 849 (2003).

As a settlement agreement is a contract it is governed by the same rules of construction and interpretation.[9] We attribute to the words of a contract their plain and ordinary meanings.[10] An unambiguous contract reflects the intentions of the parties as a matter of law. "If contractual language is unambiguous, we must interpret and enforce the contract as written. . . ."[11]

IV. ANALYSIS

ABATE asserts that the PSC misinterpreted § 4.7 of the settlement agreement and erred by failing to order Detroit Edison to allocate the CIM refund among all the rate classes. ABATE asserts that the PSC's conclusion that § 4.7 requires that the refund must first be applied to reduce the RARS balance of any rate class, and that only if further credits remain should those credits be allocated to other rate classes, does not apply § 4.7 as a whole and is arbitrary and capricious. We disagree.

The 2006 settlement agreement created the CIM, the purpose of which was to "create an incentive for [Detroit Edison] to further reduce costs in the event Electric Choice sales change[d] from the level of Electric Choice sales used in establishing a revenue reduction in this Settlement Agreement." The CIM was designed to "allow Edison to credit 100% of its increase in non-fuel revenues associated with Choice sales levels below 3,200 GWh, against any regulatory asset balances not recovered via the Regulatory Asset Recovery Surcharge (RARS) mechanism. . . ."

Detroit Edison's evidence established that because its Electric Choice sales decreased below the base level of 3,200 GWh during the period January 1, 2008, through April 13, 2008, it was required to refund $20,067,000 to its customers. The residential rate class was the only customer class that had a remaining RARS balance; therefore, Detroit Edison sought to allocate the entire refund to the RARS balance for the residential class.

Section 4.7 of the settlement agreement governs the allocation of a CIM refund. The first sentence of § 4.7 provides, "For decreases in Choice sales volume, the additional non-fuel revenue will be first used to reduce unrecovered regulatory asset balances related to the RARS mechanism." As is also indicated by § 4.3 of the settlement agreement, any CIM refund must first be allocated to unrecovered RARS asset balances.

The second sentence of § 4.7 provides, "The regulatory asset balance will be reduced by rate class and will be allocated on an equal percentage of full-service revenues." This sentence indicates that the CIM refund must be allocated among the RARS asset balances for each rate class in order to reduce the balance for each class. It was undisputed that only the residential customer rate class had a RARS asset balance remaining at the end of the relevant period. Logically, Detroit Edison could not allocate portions of the CIM refund to RARS balances that had been extinguished. In accordance with the plain language of this second sentence, because

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[9] *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 663-665; 770 NW2d 902 (2009).

[10] *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003).

[11] *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008).

only the residential rate class had a RARS balance, the CIM refund was to be applied to that balance.

ABATE asserts that Detroit Edison's decision to allocate the entire CIM refund to the RARS balance of the residential rate class ignored the second sentence of § 4.7 and also the third sentence, which provides, "If those decreases result in credits larger than the RARS asset balances after RARS surcharges are credited, then the balance of the non-fuel revenue credits will be credited to full service customers in proportion to their share of the $78.5 million rate reduction identified by this Settlement Agreement." ABATE contends that the reference in the second sentence to reduction of RARS balances "by rate class" and the reference in the third sentence to "those decreases" indicate that any CIM refund is to be allocated among the rate classes. Because only the residential rate class had a RARS balance, the plain language of the first sentence of § 4.7 required that the refund be allocated to the residential class until the RARS balance was extinguished. Under these circumstances, the allocations contemplated by the second and third sentences of § 4.7 did not come into play because only one rate class had a RARS balance. ABATE's assertion that because the CIM mechanism required each rate class to share cost responsibility each rate class should benefit from a CIM refund, ignores the plain language of the first sentence of § 4.7 that requires that any CIM refund first be allocated to reduce any remaining RARS balance. Any assertion by ABATE that commercial and industrial rate class customers have a property interest in any funds paid to Detroit Edison for service is without merit.[12]

As the settlement agreement is a contract[13], the PSC was required to give the words of the settlement agreement their plain and ordinary meaning.[14] The first sentence of § 4.7 of the settlement agreement requires that any CIM refund be first allocated to remaining RARS balances. The residential rate class was the only rate class with a remaining RARS balance. As such, § 4.7 of the settlement agreement required that the entire CIM refund be allocated to that balance.

V. CONCLUSION

The PSC's interpretation and application of § 4.7 of the settlement agreement comports with applicable principles of contract interpretation. ABATE has not presented cogent reasons for this Court to overrule the PSC's interpretation and application of the settlement agreement.[15]

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[12] See *Bd of Pub Utility Comm'rs v New York Tel Co*, 271 US 23, 32; 46 S Ct 363; 70 L Ed 2d 808 (1926).

[13] *Reicher*, 283 Mich App at 663-665.

[14] *Wilkie*, 469 Mich at 47.

[15] *Rovas*, 482 Mich at 108.

ABATE has not established "by clear and satisfactory evidence" that the PSC's decision is unlawful or unreasonable.[16]

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[16] MCL 462.26(8).